No. 22656

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

SHENANDOAH RACHEL MORALES,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

APPELLANT'S OPENING BRIEF.

NORMAN J. KAPLAN,
205 South Broadway,
Los Angeles, Calif. 90012,
Attorney for Appellant.

Parker & Son, Inc., Law Printers, Los Angeles. Phone MA. 6-9171.

TOPICAL INDEX

TABLE OF AUTHORITIES CITED

Cases

Statutes

No. 22656

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

SHENANDOAH RACHEL MORALES,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

APPELLANT'S OPENING BRIEF.

On June 22, 1966 the Grand Jury returned an indictment against the Appellant Shenandoah Rachel Morales. The indictment contains four counts. Count one charges Appellant with knowingly importing a narcotic drug, heroin, into the United States contrary to Title 21, United States Code, Section 173. Count two alleges that Appellant knowingly concealed, and facilitated the transportation and concealment of a narcotic drug, heroin, which had been imported contary to Title 21, U.S. Code, Sec. 174. Counts three and four allege the same offenses in regards to a narcotic drug, cocaine. All the offenses were alleged to have been committed on May 24, 1966.

The indictment was returned and Appellant pleaded not guilty thereto. A jury having been waived, the cause came to trial on Oct. 20, 1966 before the Honorable Fred Kunzel and Appellant was found guilty of

all four counts. Appellant's motion to suppress the evidence was denied.

Appellant filed a timely notice of Appeal on Dec. 9, 1966 and has brought up the complete record and all the proceedings to be reviewed by this Court.

Statement of Jurisdiction.

This is an appeal from the United States District Court for the Southern District of California, adjudging appellant to be guilty as charged in the indictment returned on June 22, 1966 following a trial by the court. The judgment of the court was entered on October 20, 1966. The Clerk's and Reporter's Transcripts constitute the record for this appeal.

The jurisdiction of the court is invoked under 28 U.S.C. §1291 and 28 U.S.C. §1294 (1).

Statement of the Facts.

On May 24, 1966, United States Customs Agents at San Ysidro, California were contacted by an informer from Tijuana, Mexico. The informer stated that he had observed a certain vehicle parked in a driveway adjacent to a house in which an alleged narcotics dealer resided [R. T. 66]. The informer neither stated that he knew who owned the vehicle nor that he had seen anyone operating or occupying it, but just that it was parked next to the house [R. T. 70]. Based upon this information, a supervising officer at the San Ysidro station concluded that the occupants of the vehicle—not the vehicle itself—would be carrying contraband [R. T. 71]. He consequently posted a "look-out" for the automobile [R. T. 66]. No arrest or search warrants were obtained by the officers [R. T. 72].

Later in the afternoon of the same day, the vehicle was seen by a customs agent in an inspection line at San Ysidro [R. T. 3]. The driver was ordered to drive the automobile out of the line and to an inspection area [R. T. 6]. The defendant was an occupant of the automobile. The defendant and her two male companions were instructed to exit the vehicle and to proceed to the office for "further inspection" [R. T. 12]. The defendant was not informed of her constitutional rights by the officers, nor was she arrested [R. T. 12].

After entering the office, the defendant was subjected to a "personal search" [R. T. 17], by a female "seizure clerk" [R. T. 14]. The defendant was ordered to disrobe, whereupon her clothing was searched. No narcotics were found among the articles of her clothing [R. T. 17]. Notwithstanding this fruitless search, the clerk instructed the defendant to bend over and expose her vaginal area. In conducting the examination, the medically untrained clerk [R. T. 16] thought that she observed an object "sort of like a bubble" protruding from the vagina [R. T. 20]. The defendant was requested to remove the object; however, she refused and asserted that such an object was not present [R. T. 22].

The defendant was then taken to a physician who examined her to ascertain whether she was under the influence of narcotics, had used them within a recent period, and if any contraband was concealed in a body cavity. Upon his examination of her pupils and limbs, the doctor ascertained that she was neither under the influence of drugs nor had any needle marks [R. T. 39, 41]. Even though she appeared to be in normal physical condition, the physician examined the defend-

ant's vagina wherein he found four packets containing heroin and cocaine [R. T. 35-6, 63]. Never during this period was the defendant informed of her constitutional rights or officially arrested.

Specification of Error.

The defendant was subjected to an unwarranted search of her person because the inspecting officers had neither a strong suspicion that she possessed narcotics nor a clear indication that a visual examination of her vagina would reveal such contraband.

Question Presented.

Whether an individual can be subjected to an embarrassing, undignified and intrusive search of her body cavities where investigating officers have no basis beyond conjecture to believe that she has concealed contraband within her person.

ARGUMENT.

I.

The Border Search Exception to the Fourth Amendment Cannot Be Used to Justify an Extremely Intrusive Search of the Human Body Where No Reasonable Cause to Search Exists.

A. The Rationale Underlying the Exception Does Not Contemplate Such Unconscionable Conduct.

Generally, police are empowered to make searches only under a valid search warrant issued by a judicial officer on probable cause. Searches made at the borders of the United States have been traditionally excepted from the application of the Fourth Amendment. *Boyd v. United States,* 116 U.S. 616 (1886). Authorization for "border searches" by customs agents upon suspicion only is set forth specifically by statute and has been allowed by the courts. 14 Stat. 178 (1886), 19 U.S.C. §482 (1964); *Cervantes v. United States,* 263 F. 2d 800 (9th Cir. 1959). The purpose usually articulated for allowing such an exception is

> "because of national self-protection reasonably requiring one entering the country to identify himself as entitled to come in and his belongings as effects which may be lawfully brought in". *Carroll v. United States,* 267 U.S. 132 (1925).

Border searches were originally searches of a person's clothing and luggage. Therefore, allowing indiscriminate searches was deemed within the public interest because of the necessity of enforcing the customs law and of the minor invasion of privacy.

Today, however, customs officials conduct the most degrading and humiliating searches of body cavities under the guise of border searches. Congress certainly

did not have such searches in mind when the statutes were enacted for they speak only of "vessels", "vehicles", "baggage", "envelope", "merchandise", and the like. 19 U.S.C. §§482, 1581-82. The difference between permitting a minor official to search a handbag and allowing him to perform the most thorough and degrading search of a person's body is considerable.

In view of the extremely intrusive nature of these searches, the public interest demands greater protection for the people of this nation. In short, suitcases and citizens cannot be treated similarly.

B. Decisional Law Does Not Support Such Humiliating Searches in the Absence of Reasonable Cause.

The thrust of the appellant's argument is that even though mere suspicion can justify the searching of physical possessions, it cannot justify requiring a citizen to disrobe and to submit to an examination of his body, albeit just a visual inspection. More is required to warrant an abrogation of the Fourth Amendment's protection of personal privacy and basic dignity.

The judicial decisions involving intrusive searches display a concern for the right to remain free from such searches. In *Blackford v. United States,* 247 F. 2d 745 (9th Cir. 1957), the defendant's rectum had been probed in an attempt to discover and remove contraband narcotics. The court held that use of the anal probe had not violated the Fourth Amendment because the officers had followed proper medical procedure, had used only slight force, and had "precise knowledge of what and how much was where". *Id.* at 752. Moreover, Blackford was not examined until after he was arrested based upon probable cause. *Id.* at 749.

In *Murgia v. United States,* 285 F. 2d 14 (9th Cir. 1960), the court ruled that the search of the defendant's body cavity was not violative of the Fourth or Fifth Amendments, as it was performed incident to a border search. But, the facts of this case also indicate that there was probable cause to search: The defendant and his companions were riding in a car from which an "addict's kit" had been thrown; he was not only arrested before the search, but had voluntarily consented to it; and, finally, another defendant confessed to smuggling drugs and implicated Murgia.

In *Blefare v. United States,* 362 F. 2d 870 (9th Cir. 1966), an emetic was forceably administered to the defendant to induce regurgitation. The defendant vomited two packets of heroin after ingesting the emetic. The Ninth Circuit affirmed his conviction for narcotics smuggling, holding that the heroin was not the product of an unreasonable search and seizure. However, as in *Blackford* and *Murgia,* the officers had grounds for conducting the search since Blefare had admitted to Canadian authorities that he had previously smuggled heroin across the border from Tijuana in his stomach. He also stated that he and others were aware of the rectal probes and were swallowing heroin to avoid them. All this information had been relayed to the arresting officers before Blefare had been detained. In addition, officers found that Blefare's arms were heavily marked with needle marks which indicated recent use of narcotics. *Id.* at 871.

The facts of *Blackford, Murgia,* and *Blefare* indicate that if probable cause did not exist, at least there were suspicious circumstances indicating that the defendants had concealed contraband within their bodies.

Although border searches arguably may be made on suspicion alone, they must be conducted in a reasonable manner. In this respect they are similar to ordinary searches. Reasonableness within the context of a border search has been defined variously by the courts. The opinion in *United States v. Mitchel,* 158 F. Supp. 34 (S.D. Tex. 1957), *aff'd sub. nom.* 258 F. 2d 754 (5th Cir. 1958), stated that the search must be "reasonable in scope and extent. An officer making a valid search must not resort to overly rigorous or drastic means." *Id.* at 36. This decision places a limit upon the extensiveness and intensiveness that may be used in a border search. The *Mitchel* court further ruled that a search would be reasonable "only if the circumstances warrant a search initially". *Id.* at 36. The court ostensibly intended that there be a good reason for conducting a search even if the circumstances do not constitute probable cause.

The United States Supreme Court has considered intrusive non-border searches of the body in two cases. The first is *Roachin v. California,* 342 U.S. 165 (1952), wherein the Court found that the petitioner's right to due process had been violated when police took him to a hospital where a doctor forced a tube down his throat to induce vomiting. The Court found that the conduct was such that "shocks the conscience". *Id.* at 172.

The second case is *Schmerber v. California,* 384 U.S. 757 (1966). In *Schmerber,* the Court articulated a standard which is designed to protect the "interests in human dignity and privacy" in cases that do not exhibit the aggravated circumstances of *Roachin. Id.* at 769. The Court sustained in California blood sample statute but solely because there was a "clear indication"

that the evidence would be found before the search was made. *Id.* at 770. The emphasis of the Court on the requirement that an officer have a clear indication that the search be successful appeared to interject a test similar to probable cause into the realm of intrusive border searches.

The most recent decision which is dispositive of the issue in this case is *Henderson v. United States,* Circuit Court of Appeals Case No. 21,190 (9th Cir. 1967). *Henderson* represents an application of the clear indication rule to border searches and a recognition that in preceding border search cases officers had acted upon information approximating probable cause.

The defendant in *Henderson* was detained upon attempting to cross the border because of a suspicion entertained by a customs officer which was based upon an erroneous recollection. Mrs. Henderson was forced to disrobe and submit to a visual examination of her body. When asked to expose her vagina, she became uncooperative. The inspecting agent concluded that Mrs. Henderson was concealing something in her vigina. She was subsequently taken to the office of a medical doctor whereupon an examination was conducted which revealed that packets of heroin had been secreted in her vagina.

The initial question for the court was whether the clear indication standard promulgated in *Schmerber* applied to an examination, rather than an invasion, of a person's body. The court noted that although *Schmerber* was directed to a physical penetration "its implications are broader" because the decision "emphasizes that the purpose of the Fourth Amendment is 'to protect personal privacy and dignity against unwarranted intru-

sion by the state.' " *Id.* at 3. Based on the underlying rationale of *Schmerber* the court held that the requirement extends to border searches. *Id.* at 3.

The Court then ruled that the physical examination was unwarranted as it was based upon mere suspicion. The opinion noted that the incriminating circumstances of *Blackford, Blefare,* and *Murgia* were absent. *Id.* at 5. The judges distinguished between searches of possessions and searches of the body, and hence set forth the different requirements that justify such searches:

> "Thus every person crossing our border may be required to disclose the contents of his baggage, and of his vehicle, if he has one. The mere crossing of the border is sufficient cause for such a search. Even "mere suspicion" is not required. . . . If, however, the search of the person is to go further, if the party, male or female, is to be required to strip, we think that something more, at least a real suspicion, directed specifically to that person, should be required. And if there is to be a more than casual examination of the body, if in the course of the search of a woman there is to be a requirement that she manually open her vagina for visual inspection to see if she has something concealed there, we think that we should require more than a mere suspicion. . . . Surely, in such a case to be warranted, the official's action should be backed by at least the 'clear indication' . . . required in Schmerber. . . ." *Id.* at 4. See also *Rivas v. United States,* 368 F. 2d 703 (9th Cir. 1966).

As is stated above, a casual examination can be justified only if customs agents have a real suspicion di-

rected specifically to the person who is required to disrobe. If there is to be a visual inspection of the vaginal area that requires the assistance of person being examined there must be a clear indication that the search will be successful. The facts of this case demonstrate that neither test was satisfied.

II.

The Conviction Must Be Reversed Because the Defendant Was Subjected to an Unwarranted Search Since Neither Reasonable Grounds to Believe That She Possessed Narcotics Existed nor Was There a Clear Indication That the Search Would Be Successful.

A. The Defendant Should Not Have Been Required to Disrobe Because There Were No Circumstances Upon Which the Officers Could Reasonably Entertain a Real Suspicion That She Possessed Narcotics.

A consideration of the case at bar shows that there was no basis beyond patent conjecture that the defendant had secreted narcotics in her vaginal cavity.

First, there were no suspicious circumstances leading to an arrest of the defendant before the search as in *Murgia* where the defendant attempted to dispose of a hypodermic kit, or as in *Blefare* where the defendant had previously told other reliable enforcement authorities that he smuggled drugs by ingesting the containers in which they were placed. To the contrary, the unidentified and so-called "reliable informer" [R. T. 66] in this case merely said that an automobile was parked near the residence of an alleged narcotics dealer [R. T. 67]. He did not relate to the customs authorities that he knew who owned the vehicle, that he had never seen it before, or that he had seen anyone going to or from

the car or operating or occupying it [R. T. 70]. Clearly, there was no basis upon which the customs agents could rationally conclude that the *occupants* of the automobile would be carrying contraband [R. T. 71].

Second, the search did not occur subsequent to a lawful arrest as in the *Blackford* and *Murgia* cases.

Third, the officers had not been informed of "what and how much was where" as in *Blackford.* Nor did a co-defendant's confession guide them to the location of the drugs. No specific information was obtained prior to the search that Shenandoah Morales had hidden heroin and cocaine in her vagina, nor in anyway connected to the alleged narcotic dealer.

In conclusion, there were no circumstances that justified requiring the defendant to disrobe to submit to a casual examination of her body.

B. The Defendant Should Not Have Been Required to Submit to a Visual Examination of Her Vagina Because There Was No Clear Indication That the Search Would Be Successful.

The fourth consideration involves a compendium of the three factors above coupled with an application of the *Henderson* standard. The requirement of a clear indication that evidence would be found is intended to protect a citizen's privacy by insuring that only those searches in which there is a high probability of success will be sanctioned. The standard was violated in this case.

It is unquestionable that no *clear* indication existed that the defendant had concealed narcotics within her person before she was requested to expose her vagina for a visual examination. By that time, the seizure

clerk had examined her clothing and found no narcotics. Nor was there such an indication by the time the doctor inserted a speculum into her vagina, because an examination of her eyes and limbs showed that she was not under the influence of drugs and had not received an injection within a recent period.

Conclusion.

For the reasons stated above, the appellant respectfully submits that the judge be reversed.

Norman J. Kaplan,
Attorney for Appellant.

Certificate.

I certify that, in connection with the preparation of this brief, I have examined Rules 18, 19 and 39 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those rules.

NORMAN J. KAPLAN